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In re Application of	:
CAPLYGIN	:
Application No.: 10/018,733	:
PCT No.: PCT/AU00/00661	:
Int. Filing Date: 15 June 2000	:
Priority Date: 15 June 1999	:
Attorney's Docket No.:4402-003	:
For: SYSTEM FOR ENHANCEMENT OF	:
NEUROLOGICAL PROCESSES	:

DECISION ON PETITION  
UNDER 37 CFR 1.10(d)

This decision is in response to applicant's "Petition to Correct US National Phase Filing Date Under PCT Rules 82.1(b) and 48(2) and in view of 37 CFR 1.10(d)" in the above reference application, filed 10 April 2002 in the United States Patent and Trademark Office (USPTO). Applicants request that a filing date of 17 December 2001 be accorded to the U.S. national stage papers. No petition fee is required.

### **BACKGROUND**

On 15 June 2000, applicant filed international application No. PCT/AU00/00661 which claimed a priority date of 15 June 1999, and which designated the United States.

A Demand was filed with the International Preliminary Examining Authority electing the United States. The election was made prior to the expiration of 19 months from the priority date, and as a result the deadline for entry into the national stage in the U.S. was extended and expired 30 months from the priority date, i.e. 17 December 2001 (15 December 2001 was a Saturday and 16 December 2001 was a Sunday.)

On 18 December 2001, one day after the expiration of the 30 month period, applicant filed a transmittal letter for entry into the national stage in the United States which was accompanied by, *inter alia*, the basic national fee.

On 31 January 2002, a Notification of Missing Requirements (Form PCT/DO/EO/905) was erroneously mailed to applicant indicating that an oath or declaration executed by the inventor and the surcharge for filing the oath or declaration after the thirty month period (\$65 for a small entity) was required. The notice set a response deadline of two months from the mail date of the notice or by 31 March 2002.

On 28 March 2002, applicant responded to the Notification of Missing Requirements with an executed declaration and \$65 surcharge.

On 10 April 2002, applicant filed the present request to correct the filing date of the above referenced U.S. national stage application, accompanied by (1) Customer Copy of the Express Mail label #EL803336252US, (2) the law firm's Express Mail log and (3) the verified statements of Indra Moller, the law firm's receptionist, who keeps the log; Juan Colon, the law firm's mailroom attendant who delivers packages to the post office; and Trevis Evans, United States Postal Service employee. The original Express mail envelope bearing #EL803336252US and a "Date-In" of 18 December 2001 is located in the application file.

On 10 July 2002, a Notice of Acceptance (Form PCT/DO/EO/903) was erroneously mailed to applicants.

### DISCUSSION

At the outset it is noted that applicant does not argue that there was any interruption in the mail service or unavoidable loss or delay in the mail as expressed in PCT Article 48 or Rule 82.2. Applicant acknowledges that the interruption in mail service from the period November 16, 2001 through November 29, 2001 as set forth in "Termination of the Suspension of the 'Express Mail' Service of the United States Postal Service for mail addressed to ZIP Codes 202xx through 205xx" found on the USPTO website is not applicable to his situation.

Applicant claims that the Express Mailing bearing number #EL803336252US was deposited on 17 December 2001, however #EL803336252US was marked by the United States Postal Service (USPS) with the date "18 December 2001".

Where applicant alleges that the USPS incorrectly entered the "date-in" on the Express Mail label, 37 CFR 1.10(d) is applicable. 37 CFR 1.10(d) provides as follows:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

Petitioner has satisfied (1) above as the petition is considered promptly filed.

Subsection (d)(2) above is not satisfied since it does not appear that the number of the "Express Mail" mailing "EL803336252US" was placed a transmittal letter, certificate of mailing or the like prior to the original mailing by "Express Mail". The application file does not contain any papers bearing the Express Mail number "EL803336252US". Applicant has not provided a copy of any papers or fees that constitute the correspondence on which the "Express Mail" mailing label number was associated with, prior to the original mailing by "Express Mail". Thus, subsection (2) of 37 CFR 1.10(d) is not satisfied.

With regard to 37 CFR 1.10(d) (3), applicant submitted the statement of Indra Moller, receptionist at Gottlieb, Rackman and Reisman. Ms. Moller states that she is responsible for "making the daily entries in the firm's outgoing Express Mail Log prior to the delivery of express mail packages to the United States Post Office at Grand Central Station [USPS-GC] located at 450 Lexington Avenue Front, New York, NY 10017." Ms. Moller further states that on Monday December 17, 2001, she recorded in the firm's outgoing Express Mail Log express mail label EL803336252US" prior to its deposit with the USPS. Furthermore, the log kept by Ms. Moller indicates the "Express Mail" number but does not contain (1) the place, date and time of deposit; (2) the time of the last scheduled pick-up for that date and place of deposit; (3) the depositor's initials or signature; and (4) the date and time of entry in the log. The evidence of record (Ms. Moller's declaration) establishes that the log entry was created *prior to deposit*, rather than after the deposit was made with the USPS and within one business day. Thus, the evidence provided is insufficient to establish that the correspondence was deposited with the USPS on 17 December 2001. See MPEP 513, p.500-47 (Rev.1, Feb 2000).

Juan Colon, the firm's mailroom attendant, indicates in his declaration that on 17 December 2001, between 5:00 p.m. and 5:30 p.m., he "personally delivered a small batch of express mail packages from the firm to USPS-GC", including one package bearing express mail label EL803336252US in the Express Mail Depository Box prior to the last scheduled pickup for December 17, 2001 (which is 8:00 p.m.). However, Mr. Colon's statement was made nearly 4 months after the alleged Express Mail deposit, not within the requisite "one business day" of deposit.

The declaration of Ms. Trevis Evans, administrative assistant with the USPS of New York City in the Expedited Services Department, indicates that she conducted an internal

investigation of the USPS-NYC records for express mail label EL803336252US. Ms. Evans does not state that she has first hand knowledge that the envelope bearing Express Mail no. EL803336252US was deposited on December 17, 2001 between 5:00 p.m. and 5:30 p.m. and prior to the last scheduled pickup at Grand Central station. She states that "said express mail label received a handwritten "Date-In" of December 18, 2002 [sic] by a postal employee and was indicated as having been received by the Franklin D. Roosevelt post office ... in zipcode "10150" which differs from the applicant's claimed deposit date of December 17, 2001 in USPS-GC in zipcode 10017." Ms. Evans concludes that "[t]he differences between these dates and originating zip codes was due to receipt of a high volume of express mail package from a collections depositories after 5:00 p.m. at the USPS-GC on December 17, 2001 which affected normal post office handling procedures." Ms. Evans, however, does not explain how she knows that the express mail package was taken to the Roosevelt station or why it received a date-in of 18 December 2001 nor does her statement prove that the package was deposited at USPS-GC on December 17, 2001. Thus, the declaration of Ms. Evans, while coming from a presumably disinterested third party, does not provide evidence of the deposit of the Express Mail envelope on December 17, 2001 and thus, does not satisfy 37 CFR 1.10(d).

Petitioner has clearly not provided a satisfactory showing under 37 CFR 1.10(d)(2) and (3). Accordingly, it is inappropriate, on the present record, to accord the national stage papers a date of 17 December 2001. Thus, it is concluded that the records of the USPTO that indicate that the national stage application papers were received by the USPTO on 18 December 2001 ( the date stamped on the application papers and shown on the addressee's copy of the "Express Mail" mailing label) should control.

For the reasons stated above, subsections (2) and (3) of 37 CFR 1.10(d) are not satisfied. Because the basic national fee was not paid by the thirty month deadline or by midnight December 17, 2001, the application was abandoned.

The Notification of Acceptance (Form PCT/DO/EO/903) erroneously mailed on 10 July 2002 is hereby **VACATED**. A Notification of Abandonment (Form PCT/DO/EO/909) will be issued indicating that the basic national fee was not paid by the 30 month period.

#### OPTIONS

To revive the abandoned application, applicant may wish to consider filing a petition to the Commissioner under 37 CFR 1.137(a) or (b) requesting that the application be revived. Any petition filed under 37 CFR 1.137(a) and/or a petition under 37 CFR 1.137(b) requesting that the application be revived must meet the criteria indicated in the revision of 37 CFR 1.137. See 62 Fed. Reg. 53131 (October 10, 1997); 1203 Off. Gaz. Pat. Office 63 (October 21, 1997) (Effective Date: 01 December 1997). This suggestion should not be construed as an indication as to whether or not any such petition(s) will be favorably considered.

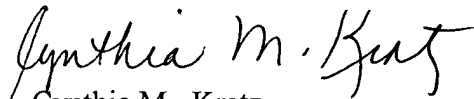
#### CONCLUSION

Applicant's request that the national stage filing of PCT/AU00/00661 as 10/018,733 be accorded a filing date of 17 December 2001 is **DISMISSED WITHOUT PREJUDICE**.

The application will be forwarded to the United States Designated/Elected Office for further processing in accord with this decision including vacating the Notification of Acceptance (Form PCT/DO/EO/903) erroneously mailed on 10 July 2002 and issuing a Notification of Abandonment (Form PCT/DO/EO/909) indicating that the basic national fee was not paid by the 30 month period and that the application is abandoned.

Any reconsideration on the merits of this petition must be filed within TWO (2) MONTHS from the mail date of this decision. Any reconsideration request should include a cover letter entitled "Renewed Petition Under 37 CFR 1.10." Extensions of time may be obtained under 37 CFR 1.136(a).

Any further correspondence with respect to this matter should be addressed to the Assistant Commissioner for Patents, Box PCT, Washington, D.C. 20231, with the contents of the letter marked to the attention of the PCT Legal Office.



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